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No. 7820

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NORTH RIVER INSURANCE COMPANY (a corporation),
Appellant and Cross-Appellee,

vs.

GUY H. CLARK, as Receiver of the Montborne Lumber Company (a corporation),
Appellee and Cross-Appellant.

BRIEF OF APPELLEE AND CROSS-APPELLANT

HENDERSON & McBEE,
Attorneys for Appellee and Cross-Appellant,
618 First Street,
Mount Vernon, Washington.

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BRIEF OF APPELLEE AND CROSS-APPELLANT

Following the example set by the appellant and cross-appellee, the appellee and cross-appellant will refer to the parties in this litigation as "plaintiff" and "defendant."

As is stated in the opening pages of the brief for appellant and cross-appellee, two claims by the plaintiff, Montborne Lumber Company, were asserted against a policy of insurance written that company by the defendant insurance company.

One claim involved damages to a logging locomotive. The second claim involved recovery for damages to some flat cars owned by the Northern Pacific Railway.

The lower court granted the plaintiff judgment upon its cause of action on the locomotive, from which decision the defendant appealed. The lower court denied any recovery upon the cause of action for the logging flat cars, and from this decision the plaintiff cross appeals.

The opening brief served upon counsel for the appellee and cross-appellant deals only with the judgment for the value of the locomotive and this brief, being in reply, will concern itself with that question only. A separate opening brief on the question of the damaged flat cars has been written and filed in view of the fact that counsel for the Northern Pacific Railway, who have no connection with the case involving the locomotive, will write the answering brief on the cross appeal.

STATEMENT OF THE FACTS

The facts were all embodied in a written stipulation. (Tr. p. 33 to 39) and the appellee finds no fault with the statement of the facts contained on pages 2 to 5 of appellants' brief.

ARGUMENT

The policy sued upon wherein the plaintiff's predecessor in interest, the Montborne Lumber Company is the named assured reads in part as follows:

> "in consideration of the stipulations herein named, and of $630.00 premiums, does hereby insure Montborne Lumber Company * * * (Tr. p. 49) against loss or damage caused by fire, derailment or collision * * * to rolling stock as per schedule." Tr. p. 50)

A description of the locomotive concerned in this litigation was contained in the schedule which was attached to the policy. (Tr. p. 57)

In the first instance, the court's particular attention is directed to the language of the policy, and it is to be noted that the policy is more than a mere policy of insurance against fire only, for the language of the policy provides that the named assured is insured against the

> "loss or damage caused by fire * * * collapse of bridges, lightning, etc." (Tr. p. 50)

The policy is obviously what might be termed a "railroad policy."

A diligent search by counsel for both sides has failed to reveal any cause on all fours with the question before the court.

An examination and study therefore of the general

rules covering the situation must be made.

It is appellant's contention that inasmuch as the locomotive itself was not physically damaged and that the plaintiff still has its locomotive that no recovery should be allowed. This is not the law.

FIRE NEED NOT TOUCH INSURED PROPERTY

A fair statement of what damages are recoverable under a policy of fire insurance is found in **26 C. J. 340,** and reads as follows:

> "In order that there may be a recovery on the policy the fire must have been the proximate cause of the loss; or in other words such loss only can be recovered as is the proximate and immediate result of the fire as distinguished from a remote loss, and proximate loss, within this rule includes not only losses which are directly caused by the fire itself, but also losses of which the fire is the efficient cause by setting in motion other agencies, but the fire must reach the thing insured, or come within such proximity to it that damage direct or indirect is within the compass of reasonable probability. Recovery may be had for the proximate loss although the insured property is brought within the peril of the fire by some outside agency. Any loss resulting from an effort to put out a fire, or otherwise save the property, whether by spoiling the goods or otherwise, directly or indirectly, is within the policy."

To the same effect is **14 R. C. L. 1216:**

> "As in marine insurance, insurers against fire are answerable for direct and immediate, but not for consequential and remote, losses from the peril insured against."

The rule is also well stated in **6 Couch on Insurance, Sec. 1467, p. 5304:**

> "So the law of insurance seeks to administer according to the fair interpretation of the intent of the parties, and deems that to be a loss, within the policy, which is a material and necessary consequence of the peril insured against. Similarly a loss by fire includes every loss necessarily following from the occurrence of a fire if it arises directly and immediately from the peril or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided; that is consequences naturally flowing from or incident to a peril insured against, are attributable thereto; and as already noted it is held that if the thing insured becomes directly chargeable with any expense, contribution or loss in consequence of a particular peril that peril is the proximate cause of such expense."

To the same effect and slightly more pertinent is **14 R. C. L. 1216:**

> "But to render a fire the immediate or proximate cause of loss or damage, it is not necessary that any part of the insured property should be actually ignited or consumed by fire. Insurance against loss by fire includes loss where the cause insured against was the means or agency in causing the loss, even though it was entirely due to some other active, efficient cause which made use of it or set it in motion."

Another case announcing this rule is the case of **Ermentraut vs. the Girard Fire Ins. Co., Minn. (1895) 65 N .W. 635:**

> "To render the fire the immediate or proximate

> cause of the loss or damage, it is not necessary that any part of the insured property actually ignited or was consumed by fire. This is so well settled that the citation of authorities in support of the proposition is unnecessary. The question is, was the fire the efficient and proximate cause of the loss or damage."

In the case of **Russell vs. German Fire Insurance Company, (Minn.) 10 L. R. A. (N. S.) 326, 111 N. W. 400,** this principle was also applied.

In that case, the wall of an adjoining five-story building which had been left standing after a fire in that building, fell some seven days thereafter. At that time a strong wind was blowing, the walls left standing from the building consumed by fire fell and damaged the adjoining building, and in a suit by the owner of the adjoining building against the insurance company which had the insurance upon **that** building, the lower court found that the cause of the walls falling was the fire and not the wind, and upon this finding the appellate court affirmed the judgment, using this language:

> "It was at least a question of fact, and the finding of the trial court that the fire was the cause of the injury is sustained."

And in **Western Assur. Co. vs. Hann (1917) 201 Ala. 376, 78 So. 232,** following the above Russell case, it was held that whether or not the proximate cause of the loss of a stock of goods resulting from the falling, dur-

ing a strong wind, of the wall of a building adjoining the building in which the goods were, was a fire in such building, which had taken place some four months before, and which had left such wall standing as a result thereof, was a question for the jury, the court having determined that the word "direct" as used in the policy insuring the goods "against all direct loss or damage by fire" meant nothing more than "proximate" and a finding of the jury in the affirmative was approved of, the court saying that the evidence authorized the jury to find that the fire was the proximate cause of the loss, and that the wind was but an intervennig agency, or incident in the chain of events which could reasonably have been foreseen.

Another case which is pertinent to the inquiry is the case of **Brandyce vs. U. S. Lloyds, Inc. (N. Y. 1924) 147 N. E. 201: (Also in 203 N. Y. S. 10)**

> "Appeal, by permission, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (207 App. Div. 665, 203 N. Y. S. 10) entered January 14, 1924, in favor of plaintiffs upon the submission of a controversy under sections 546 and 547 of the Civil Practice Act. The action was to recover under a policy of marine insurance by which the defendant insured a shipment of potatoes on the steamship Coriscana from New York consigned to Caibarien, Cuba. The vessel struck some unknown object and was damaged to such an extent that she had to put into Charleston, S. C., to make repairs. The shipment of potatoes here involved was not injured directly

by the collision or touched sea water, but in order to make the repairs, the cargo, including the potatoes, had to be discharged and held at the port of refuge until the repairs were completed and the vessel resumed her voyage. The potatoes, being perishable, were not able to stand the delay, and on the advice of surveyors, whose conclusions are not disputed, the potatoes were sold for upwards of sixty per cent. of their sound value. It is agreed in the submission that "the only loss suffered, or which would have suffered by them, was natural deterioration" and that the vessel completed her repairs and carried out the voyage. The question involved is whether loss by natural deterioration during a delay of the voyage caused by a sea peril is a loss by sea perils. The appellate division held that the proximate cause of the loss was the sea peril and directed judgment for plaintiff."

QUESTION ONE OF CAUSATION

It is apparent from the foregoing authorities that fire need not physically touch or damage the thing insured, but that the insurer is liable if the fire is the proximate cause of the damage.

The case of **Hall vs. Great American Insurance Company, (Iowa) 1934, 252 N. W. 763** is instructive on on this point.

The facts in that case were that the plaintiff was the owner of a dwelling house and household furniture which were covered by a policy of fire insurance. The policy provided that "clocks, watches and jewelry in use" were included in the policy.

The plaintiff's premises burned. The evidence show-

ed that shortly before the fire the plaintiff, who owned a diamond ring, had placed the same on the mantel in his house on the morning of the fire.

> "that no one was in the house except himself, his wife, and his son from that time until the time of the fire; and that no one of these three persons removed the diamond from the mantel. While the fire was in progress, many people were in and out of the house helping remove furniture and other articles. The fire consumed the upper portion of the house, and, in trying to subdue it, the fire company used such large quantities of water that after the fire the water on the living room floor was two or three inches deep. After the fire was over the living room floor and mantel were covered with water, fallen plaster and debris, and, as soon as it was possible to enter the house after the fire, a search was commenced for the diamond, but it was not found."

The court holds that upon this evidence the jury could well find that the diamond was lost or destroyed as a direct or proximate result of the fire in question.

Another example of the application of the rule of causation is found in the case of **Lynn Gas and Electric Company vs. Meriden Fire Insurance Company, 158 Mass. 570, 33 N. E. 690, 20 L. R. A. 297.**

The policy in that case insured a building and machinery against loss or damage by fire.

A fire occurred in the wire tower, situated some distance from the building in which the dynamos and other electrical machines of the insured were placed.

By reason of the burning of the wire tower a short circuit was formed. This caused a sudden increase of pressure upon the driving belt of the dynamo, which parted, and left the engine without restrait. The fly wheel, thus caused to revolve too rapidly, burst, and wrecked the machinery and building. It was contended by the defendant that the loss to the machinery and building was too remote to be covered by the insurance against fire. But the court held that there was an unbroken chain of causation between the fire in the tower and the wrecking of the building and machinery, and therefore held the insurer liable as for damage by fire.

An other example of the liability of an insurer for damages not physical to the property is the case of **Stag Mining Company vs. Missouri Fidelity Company, Missouri (1919) 209 S. W. 321.** In this case the plaintiff company had an employer's liability policy. A workman was injured, due to the negligence of the company, and died as a result of his injuries. His widow brought suit against the mining company and recovered a judgment for $5,000.00. The insurance company did not pay the judgment and the widow levied execution on the property of the mining company. Certain property of the mining company was sold on execution sale for $450.00. As a matter of fact, the reasonable market value of the property thus sold on execution was the sum of $5,000.00.

In a suit brought by the mining company against the insurance company, the insurance company defended upon the ground that they were liable only for the $450.00 and that they were not liable for the $5,000.00.

The court, in deciding the liability of the insurance company to be the reasonable value of the property sold, uses the following language:

> "Nor can there be any objection to fixing the amount of damages at the reasonable value of the property seized and sold because of same being uncertain and speculative. The reasonable value of the property at a given time and place is the measure of damages in trover, conversion, replevin, and a variety of actions, and such value can readily be arrived at with reasonable certainty. If the plaintiff was with reasonable certainty. If the plantiff was claiming damages by reason of loss to its business or of future profits by reason of being deprived of the use of the mining plant and machinery seized and sold, then the defendant might well claim that such damages are consequential, remote, or speculative; but not so where plaintiff is claiming no more than the reasonable value of the property taken from it.
>
> Turning again to the policy itself, we find that the agreement is to indemnify the assured for loss or damage by reason of legal liability, and then natural inquiry is: What did the assured lose, or how much was it damaged, by reason of the seizure and sale of this property? The question is not how much did the execution plaintiff receive, because that is not necessarily the amount which the assured lost, even when leaving out such itmes as court costs or attorneys' fees where same are paid by the assured. The liability of the defendant is

for the loss or damage to the assured, and not the advantage or gain to the injured employee."

As sustaining the rule quoted from 6 Couch on Insurance, Sec. 1467, p. 5304 that all expenses flowing from or incident to a peril insured against are attributable thereto, and that if the thing insured becomes directly chargeable with any expenses that expense is recoverable against the insurance company, is the case of **Hale vs. Washington Insurance Company, Fed. case No. 5916, 11 Fed. cases, p. 189.**

The facts in this case were that an American ship carrying a policy of insurance insuring it against perils of the sea collided with a British ship in British waters. The British owners threatened to libel the American vessel. The master of the American vessel compromised with the British owner.

The American ship was also damaged in the collision.

In a suit by the owners of the American ship against the insurance company, the company defended upon the grounds that they were liable only for the physical damage to the American ship and were not liable for the sum paid in compromise to the owners of the British ship by the master of the American ship.

Mr. Justice Storey, the author of the opinion, in

holding the insurance company liable for the full amount, uses this language:

> "The argument seems to suppose that the insurance attached only to the extent of the direct injury sustained by the very thing insured. But that argument is not well founded. Any and every expense borne by and chargeable upon the owner of the thing insured, and as a direct and immediate consequence of a peril insured against, is covered by the policy.
>
> * * * The truth is that in all these and the like cases, we look to the origin of the loss. If it be a peril insured against, all the incidents and attachments thereto by law, as necessary or natural incidents become a part of the loss, just as much as the storage of goods saved from a shipwreck is deemed a part of the loss; and the expenses in court of a suit to ascertain the salvage are also deemed a part of the loss."

The last case to which the plaintiff desires to call the court's attention in the matter is the case of **Brady vs. Northwest Insurance Company, 11 Mich. 425.**

The facts in that case were that the defendant had issued a policy of fire insurance on a frame warehouse in the city of Detroit. A fire occurred and there was some damage to the warehouse.

A city ordinance of Detroit at the time of the fire prohibited the rebuilding of wooden structures within certain areas and the warehouse was in this area.

The insurance company, in a suit by the owner of the building, defended on the grounds that they were

liable only for the value of the material damaged by the fire.

While the insured claimed that by virtue of the fire and the ordinance the building to him was a total loss, in holding the insurance company liable for a total loss, the court said:

> "Under this rule, what was the plaintiff's loss in the present case? The property insured was situated within the fire limits of Detroit, within which the reconstruction or repair of any wood building injured by fire was prohibited, unless by leave of the common council. The charter and ordinances of the city upon this subject and the refusal of the common council to permit the repair of the building injured were offered in evidence to show the extent of the plaintiff's loss and rejected. This charter and these ordinances were in existence at the time of the last renewal of the policy. They were local laws affecting the property and the risk which the defendant assumed and of which the latter is presumed to have had knowledge and to have estimated in renewing the policy. Whether therefore in case of damage or partial loss the common council would permit a repair of the building, was a risk which the company took upon itself, because the loss and injury to the plaintiff might depend in amount upon such action of the council, while such loss and injury would be absolutely and actually the consequence of the fire; and because by the terms of the policy, the company reserved the right to repair or not at option, thus taking the risk of the power to repair, and of all loss which should accrue if repairing should be impossible from any cause. To hold that for an injury to the property which results, without the fault of the insured, in a total loss to him, so far as value and use are

concerned, the insured can only receive compensation to the extent of the appraised damage to the materials of which the building was constructed and which were destroyed would establish a narrow, illiberal and illogical rule. The value of the building consisted of its adaptation to use as well as in the materials of which it consisted; and if it could not be restored to use after the fire, the loss was total, less the value of the materials rescued. In the very pertinent language of the plaintiff's counsel, 'The contract was not simply an agreement to pay for so much material as might be damaged by fire to pay such amount as the material might actually be worth. Fixed by the conditions of the policy as the most hazardous of all structures, and with a premium adjusted accordingly, the insurer took the risk upon a three story wood warehouse actually in use as such. The risk was not taken upon a collection of beams, boards and other materials all thrown together without purpose of special adaptation. It was upon a building for trade, situate within a particular locality and within the jurisdiction of municipal authorities vested with legislative powers for special purposes and subject to the exercise of those powers;" and the parties must be regarded as having contracted with a full knowledge of all the facts and the law and the risk to which the property was thereby subjected."

The appellant argues that the logic of the case just above cited is not applicable because in that case there was an actual physical damage to the property. This argument is aptly and conclusively refuted by the language of **Hale vs. Washington Insurance Co., Fed. Cases, No. 5916, 11 Fed. Cases p. 189** where the same argument was advanced and the court said:

> "the argument seems to suppose that the insurance attached only to the extent of the direct injury sustained by the very thing insured. But that argument is not well founded. Any and every expense borne by and chargeable upon the owner of the thing insured, and as a direct and immediate consequence of a peril insured against, is covered by the policy."

To sustain appellant's contention in this respect would compel a holding to the effect that a physical damage to the locomotive must occur and that the well established rule for the determination of liability upon fire insurance policies, to-wit, that of causation, is erroneous.

This contention is also specifically negatived in **14 R. C. L. 1216:**

> "But to render a fire the immediate or proximate cause of loss or damage, it is not necessary that any part of the insured property should be actually ignited or consumed by fire. Insurance against loss by fire includes loss where the cause insured against was the means or agency in causing the loss, even though it was entirely due to some other active, efficient cause which made use of it or set it in motion."

and also in the case of **Ermentraut vs. the Girard Fire Ins. Co. (Minn. 1895, 65 N. W. 635):**

> "To render the fire the immediate or proximate cause of the loss or damage, it is not necessary that any part of the insured property actually ignited or was consumed by fire. This is so well settled that the citation of authorities, in support of the proposition is unnecessary. The question is,

was the fire the efficient and proximate cause of the loss or damage."

Other authorities to the same effect are **6 Couch on Insurance Sec. 1467, p. 5304:**

> "Similarly a loss by fire includes every loss necessarily following from the occurrence of a fire if it arises directly and immediately from the peril or necessarily from incidental and surrounding circumstances, the operation and influence of which could not be avoided; that is consequences naturally flowing from or incident to a peril insured against, are attributable thereto; and as already noted it is held that if the thing insured becomes directly chargeable with any expense, contribution or loss in consequence of a particular peril that peril is the proximate cause of such expense."

The appellant also argues that to allow a recovery under the facts in the case at bar would mean that the policy would be broadened to insure the policy holder against all damages to the rolling stock and rolling equipment which would prevent the operation of the locomotive.

It is appellee's contention that when a damage occurs, caused by a peril insured against, which renders the locomotive valueless, that the company is liable, and if a fire occurred doing damage to a bridge of $500.00, and that on account of that damage the locomotive became valueless, that the company would be liable.

In other words, the insurer is liable for the damages sustained by the assured to its property covered by the policy and caused by fire whether fire consumed, touched or destroyed the property or not.

A case much relied on by appellant is the case of **Edgar Thompson Steel Co. vs. Boylston Mutual Insurance Company, 120 Mo. Appeals, 244.**

The subject matter of this insurance was a cargo of pig iron insured against the perils of the sea. The iron was loaded on a barge and sank. The insurance company recovered the pig iron and sent it to its destination intact, but its arrival was delayed for several days.

The assured brought suit against the company for the difference in the market value at the time when the iron arrived and the price it would have brought had it arrived on time, and the court denied recovery.

Appellant cites this case as authority for the proposition that appellee is here attempting to collect insurance on profits.

Appellee has no complaint with the decision in this case and if applying the same logic the appellant will make the same effort to comply with its contract as did the company in the cited case, appellee will have no complaint.

In other words, in the cited case, the insurance

company recovered the pig iron and sent it to its destination. If the company in the case at bar will repair the bridges so that the locomotive can be run upon appellee's railroad, appellee will have no complaint, and would have no claim for damages for the time that the locomotive had remained idle.

CONCLUSION

In conclusion it is submitted that by reason of a peril insured against, to-wit, fire, the value to the plaintiff of the locomotive is completely wiped out, that the expense of rebuilding the trestles and bridge is, in the language of the Hale case, an

> "expense borne by and chargeable upon the owner of the thing insured, as a direct and immediate consequence of the peril insured against."

and as such, is covered by the policy.

Or, in the language of the Brady case,

> "the risk was not taken upon a collection of beams, boards, and other materials (in the case at bar, steel, iron and brass) thrown together without purpose of special adaptation. It was upon the building (locomotive) for trade * * * and the parties must be regarded as having contracted with a full knowledge of all the facts (including the location of the locomotive and the building) and the law and the risk to which the property was thereby subjected." (Words in parentheses ours)

It is respectfully submitted that the cause on the

appeal of the appellant and cross appellee should be affirmed.

HENDERSON & McBEE
Attorneys for Cross Appellant
and Appellee
618 First Street,
Mount Vernon, Washington